In my opinion, any action which questions the legality of any appointment or disciplinary proceedings of a society registered under the Co-operative Societies Act 1948 does not come within the purview of the phrase "any dispute touching the business of a registered society" if the test propounded by Bray J. in *Heard* v. *Pickthorne (supra)* is to be applied. Such a construction would seem to accord with section 49(2)(c) of the Act which provides that "The Registrar-General may, on receipt of a reference under subsection (1) require the parties concerned to refer the dispute to a court."

Since the learned judge struck out the Originating Summons on the mistaken belief that section 49(1) of the Co-operative Societies Act 1948 applied when it did not, I would set aside his order and allow the appeal with costs here and below.

Appeal dismissed.

Solicitors: *Murthi & Partners; Dennis Xavier & Co.*

ABDUL MALEK BIN HASSAN v. MOHAMMAD HIHWAN BIN MASTUKI & ANOR.

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah S.C.JJ.) June 19 & October 25, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 413 of 1985]

Torts – Road Accident – Schoolboy aged 17½ years killed in road accident – Loss of earnings during "lost years" – No award given – Civil Law Act, 1956, ss. 7 & 8.

Damages – Fatal accident – Loss of earnings during "lost years" – No award given .

In this case the deceased a schoolboy aged 17½ years old was killed in a motor accident. His father brought an action against the respondents under the provisions of sections 7 and 8 of the Civil Law Act, 1956. The learned Judge made no award for loss of future earning during the lost years (the number of years of a person's life which had been shortened as a result of the accident). The appellant appealed.

Held: on the facts of this case, the learned Judge was correct in holding that there should be no award for loss of future income in respect of the "lost years" on the ground that the appellant had failed to prove that the deceased, at the time of his death, had any real prospects of earning such an income. In this case the deceased did not appear to have made a start or attempt to look for a job.

Cases referred to:

(1) *Harris* v. *Bright's Asphalt Contractors Ltd.* [1953] 1 All E.R. 395.
(2) *Pope* v. *D. Murphy & Son* [1960] 2 All E.R. 873.
(3) *Oliver* v. *Ashman* [1961] 3 All E.R. 323.
(4) *Skelton* v. *Collins* (1966) 115 C.L.R. 94.
(5) *Pickett* v. *British Rail Engineering Ltd.* [1980] A.C. 136.
(6) *Gammell* v. *Wilson* and *Furness* v. *B. & S. Massey* [1982] A.C. 27.
(7) *Yap Ami & Anor.* v. *Tan Hui Pang* [1982] 2 M.L.J. 316.
(8) *Taff Vale Railway Co* v. *Jenkins* [1913] A.C. 1

SUPREME COURT.

Khoo Eng Chin for the appellant.

R.K. Nathan for the respondent.

Cur. Adv. Vult.

Seah S.C.J. (delivering the Judgment of the Court): The deceased, Ahmad Fadzil bin Abdul Malek was killed in a motor accident and his father, the appellant (plantiff in the court below) brought an action for damages against the respondents (defendants in the court below) under the provisions of sections 7 and 8 of the Civil Law Act 1956. It is common ground that section 7 is based substantially on the Fatal Accidents Acts 1846-1908 and section 8 is modelled along the Law Reform (Miscellaneous Provisions) Act 1934. At the time of his death the deceased was 17½ years old and was not in gainful employment. He was a student in Form V. The learned judge made no award for loss of future earnings during the "lost years" (the number of years of a person's life which had been shortened as a result of the accident) and leave was given to appeal against this part of his judgment.

In *Harris* v. *Bright's Asphalt Contractors Ltd.*(1) Slade J. held that no damages can be recovered in respect of lost earnings for the period between the date of his probable death and the age to which he was likely to have lived if he had not had the accident. Streatfield J. in *Pope* v. *D. Murphy & Son*(2) held that the injured plaintiff was entitled to be compensated for what he had in fact lost through the defendants' negligence, and therefore, the period to be considered in assessing damages for loss of earning capacity was the period during which, apart from the accident, he might reasonably have expected to work, not the period of life left to him as a result of the accident. In *Oliver* v. *Ashman*(3) the Court of Appeal overruled

Pope case and approved *Harris* case. The Court held that no claim for loss of earnings can be made in respect of the period the plaintiff could have expected to live, had his life expectation not been shortened by the accident giving rise to his claim. He cannot recover in respect of the earnings he could have expected during the "lost years". *Oliver* v. *Ashman* (*supra*) was not followed by the High Court of Australia in *Skelton* v. *Collins*[4] and was eventually overruled by the House of Lords in *Pickett* v. *British Rails Engineering Ltd.*[5] where it held that a *living* plaintiff could recover damages for loss of income for the "lost years" and only Lord Russell dissented.

Two years later, the issue for the House of Lords in *Gammell* v. *Wilson* and *Furness* v. *B. S. Massey*[6] was whether a claim for damages for loss of earnings during the "lost years" could be brought by the victim's estate under the Law Reform (Miscellaneous Provisions) Act 1934 in a case where the victim had died before he had recovered judgment in court. The facts of the 2 cases were broadly similar: both involved claims by parents representing the estates of deceased children, a 15 years old boy killed in a road accident in *Gammell* case and a 22 years old unmarried man killed at work in *Furness*. In both cases substantial awards for loss of earnings during the "lost years" had been made to the estate. The House of Lords including Lord Russell unanimously upheld these awards holding *inter alia*, that after the decision in *Pickett* case, the outcome in the present appeals were very probably inevitable.

The decision of the House of Lords in *Gammell* case was based on the construction of section 1(2)(c) of the Law Reform (Miscellaneous Provision) Act 1934 and it is not in dispute that section 1(2)(c) is similar in all material respects to our section 8(2)(c) of the Civil Law Act 1956. Although a decision of the House of Lords is not binding on us but the House of Lords was discussing a section of the Law Reform (Miscellaneous Provisions) Act 1934 which is identical to section 8(2)(c) of the Civil Law Act 1956. In these circumstances *Gammell* case is highly persuasive and should be followed unless it is unacceptable in principle. In fact, the interpretation in *Gammell* case was adopted by the former Federal Court in *Yap Ami & Anor* v. *Tan Hui Pang*[7].

Before embarking on any assessment of loss of earnings in respect of the "lost years" we think the following observations of Lord Wilberforce and Lord Diplock ought to be noted. In *Pickett* case at page 150 Lord Wilberforce said:

> "My Lords, in the case of the adult wage earner with or without dependants who sues for damages during his lifetime, I am convinced that a rule which enables the 'lost years' to be taken account of comes closer to the ordinary man's expectation than one which limits his interest to his shortened span of life. The interest which such a man has in the earnings he might hope to make over a normal life, if not saleable in a market, has a value which can be assessed. A man who receives that assessed value would surely consider himself and be considered compensated – a man denied it would not. And I do not think that to act in this way creates insoluble problems of assessment in other cases. In that of a young child [see *Benham* v. *Gambling* [1941] AC 157 (2½ years old)], neither present nor future earnings could enter into the matter: in the more difficult case of adolescents just embarking upon the process of earning [see *Skelton* v. *Collins* (1966) 115 CLR 94 (17 years old)] the value of 'lost' earnings might be real but would probably be assessable as small."

In *Gammell* case at page 65 Lord Diplock said:

> "My Lords, if the only victims of fatal accidents were middle-aged married men in steady employment living their lives according to a well-settled pattern that would have been unlikely to change if they had lived on uninjured, the assessment of damages for loss of earnings during the 'lost years' may not involve what can only be matters of purest speculation. But as the instant appeals demonstrate and so do other unreported cases which have been drawn to the attention of this House, in cases where there is no such settled pattern – and this must be so in a high proportion of cases of fatal injuries – the judge is faced with a task that is so purely one of guesswork that it is not susceptible of solution by the judicial process. Guesses by different judges are likely to differ widely – yet no-one can say that one is right and another wrong."

Now in *Gammell* case the deceased was just over 15 years old when he was killed in a motor accident. His father, suing as administrator of the deceased estate issued a writ claiming damages under the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934. Judgment for the sum of £2000 was given under the 1976 Act and £9590 under the 1934 Act. The £9590 was made up of (a) £6656 for damages for loss of income, (b) £1184 as special damages and (c) £1750 for loss of expectation of life.

Furness was 22 years old, active and healthy, in steady employment living at home and unmarried when he was killed at work. In a claim for damages the judge awarded total damages under the 1934 Act at £19,106 including £17,275 for loss of future earnings but having found some contributory negligence by the deceased, he awarded 90 per cent of that amount.

Furness case is clearly distinguishable from the present case in that there the deceased was in gain-

ful employment and was receiving a steady income at the time of his death.

In *Gammell* case we think the headnote seems rather misleading. It gives the impression that the deceased was not earning any wage at his death. This is what Lord Scarman had to say about this deceased at page 79:

"The boy was 15. His father is of the Romany blood, uneducated and illiterate. His mother is a well-educated woman who, as a witness, impressed the judge. She knew her boy and was confident he would make his way in the world. He never went to school, but his mother taught him his three "Rs". At 14 (the year before he died) he began work. When he died, he was earning £20 a week from the sort of work, and had won the confidence of his sensible mother, who had herself educated him."

In short, at the time of his death, the deceased in *Gammell* case albeit only 15 years of age, was actually earning £20 per week and that he had commenced to earn his living at the young age of 14. Similarly, in *Skelton* case the plaintiff was 17 years old when the accident happened and he was earning approximately £13 a week. At the trial when he would be about 21 years of age, he would probably have earned something in excess of £20 a week.

Here the deceased was still at school when he was killed. We do not know for how long his father intended to keep him there after Form 5. He might or might not be selected for Form 6 classes. His general education and upkeep would have a substantial burden to the father for several more years if he had lived. In other words, the deceased in this instant case had not even started to apply for a job or to look for employment. His future was fraught with uncertainties – uncertainties not only as to how long the father would continue to keep him in school but also as to when in the future he would start to earn his living.

We do not think that the deceased should have been actually earning money or money's worth or contributing to the support of the plaintiff at or before the date of his death provided that the plaintiff had a reasonable expectation of pecuniary benefit from the continuance of the life [see *Taff Vale Railway Co.* v. *Jenkins*[3]]. In that case, the father brought an action for damages for the loss of his daughter aged 16, under the Fatal Accidents Act 1846. It was proved that at the date of her death, the deceased, who was living with her parents, was nearing the completion of her apprenticeship as a dressmaker and was likely in the near future to earn a remuneration which might quickly have become substantial. In our opinion, the same principle could in justice be extended to a claim under section 8(2)(c) of the Civil Law Act 1956. In *Gammell* case at page 78 Lord Scarman said that if the plaintiff could establish a "real prospect" of employment an assessment would be made. His Lordship, however, cautioned against making assessment based on fanciful speculation without any basis of fact. For example, in the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is a mere speculation. No estimate being possible, no award – not even a "conventional" award – should ordinarily be made". Support for this view may be found in a passage in the judgment of Lord Wilberforce in *Pickett* case at page 150 where his Lordship said:

"In that of a young child (cf. *Benham* v. *Gambling* [1941] A.C. 157 [2½ years]), neither present nor future earnings could enter into the matter: in the more difficult case of adolescents just embarking upon the process of earning (cf. *Skelton* v. *Collins* (1966) 115 C.L.R. 94 [17 years]) the value of 'lost' earnings might be real but would probably be assessable as small."

There is no need for us to deal with all the many cases on this subject which have been referred to by learned counsel for both the appellant and the respondents in this appeal and which have been carefully, and in our opinion, correctly, analysed in the judgment of Peh Swee Chin J. Unless the plaintiff can adduce evidence to satisfy the trial court that at the date of his death the deceased was about to complete his apprenticeship or probation period, there is no material on which an assessment can properly be made. In such circumstances, the judge should refrain from entering into speculation or guesswork in assessing the deceased's estimated loss of future earnings in respect of the "loss years". As Lord Scarman rightly pointed out in *Gammell* case at page 79 "The judge must make the best estimate based on the known facts and his prospects at the time of death". This test seems to be supported by *Taff Vale* case, and we would adopt it in construing the provisions of section 8(2)(c) of the Civil Law Act 1956. It follows that on the facts of this case, we agree with the learned judge that there should be no award for loss of future income in respect of the "lost years" on the ground that the plaintiff had failed to prove that the deceased, at the time of his death, had any real prospects of earning such an income. In this case, the deceased did not appear to even make a start or attempt to look for a job.

For the above reasons we dismiss the appeal with costs to the respondents. The deposit to be paid to the respondents on account of taxed costs.

Appeal dismissed.

Solicitor: *Khoo & Sidhu; R.K. Nathan & Co.*

MUNUSAMY v. PUBLIC PROSECUTOR

[S.C. (Salleh Abas L.P., Mohamed Azmi & Wan Hamzah S.C. JJ.) July 23 & November 27, 1986]

[Kuala Lumpur – Supreme Court Criminal Appeal No. 6 of 1986]

Criminal Law and Procedure – Trafficking in dangerous drug – Duty of trial judge at end of prosecution case – Prima facie case – Question of law whether there is evidence not inherently incredible to prove essential ingredients of charge – Necessity to evaluate and weigh evidence – Criminal Procedure Code (F.M.S. Cap. 6), ss. 173(f), 180, 181(1) & 190.

Evidence – Adverse inference – Withholding or suppression of evidence – Evidence Act, 1950, s. 114(g).

Dangerous Drugs – Trafficking in – Informer – Chemist's opinion – Dangerous Drugs Act, 1952, ss.37(da)(vi), 39 & 40.

This was an appeal from the conviction of the appellant for the offence of trafficking in cannabis, a dangerous drug. The appellant was sentenced to death. On appeal, the conviction was attacked on five main grounds. The argument on the first three grounds evolved around the provision of adverse inference under section 114(g) Evidence Act 1950 on (a) the non-production of the unknown informer, (b) the non-production of the typist of the Chemistry Department, and (c) the absence of accuracy certificate in respect of the weighing machine used by the Government Chemist. The fourth ground of appeal was concerned with the opinion of the Chemist that the substance sent to him for analysis was cannabis as defined in the Dangerous Drugs Act. It was argued that the opinion should not be accepted as it was based on defective analysis. The fifth ground was directed towards the following passage in the judgment of the learned trial judge in calling for the appellant to enter his defence: "I accepted the evidence of Insp. Khoo, DPC Lian and ASP Ahmad. They all gave their evidence in a manner highly indicative of their having no axe to grind and their having to give evidence on account of their duty to do so. They were neither vindictive nor self-righteous. They impressed me as witnesses of truth. I therefore called for the accused to enter on their defence, satisfied that there was a *prima facie* case for him to answer."

It was argued that in accepting the credibility of the prosecution witnesses at that stage of the trial the learned trial judge ran foul of the principle of law as laid down by the Privy Council in *Haw Tua Tau* v. *Public Prosecutor.*[4]

Held: (1) it is essential to appreciate the scope of section 114(g) of the Evidence Act, 1950 lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but a material document by a party in his possession nor for non-production of just any witness but only an important and material witness to the case;

(2) in regard to the non-calling of the informer in this case, the protection of section 40(1) of the Dangerous Drugs Act, 1952 clearly applies since the evidence showed that all the informer did was to accompany the police officer and introduce him to the appellant;

(3) there was overwhelming evidence that the cannabis produced in court was indeed the one recovered by the police from the appellant and the evidence was sufficient to rebut any adverse inference under section 114(g) Evidence Act so as to render the calling of the typist as a prosecution witness, to show the clerical mistake in addressing the exhibits, wholly unnecessary;

(4) in this case the amount of cannabis was shown to be more than 600 grammes of the drug, although only 200 grammes are sufficient to attract the presumption of trafficking under section 37(da)(vi) of the Dangerous Drugs Act and therefore whatever inaccuracy there might be in the weighing machine (for which there is no evidence) is covered by the legal maxim *"de minimis non curat lex"*;

(5) in this type of cases where the opinion of the Chemist is confined only to the elementary nature and identity of the substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the Chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step;

(6) it is obvious that there is nothing in the *Haw Tua Tau* case to suggest that the *prima facie* case approach as understood in criminal trials in this contrary is wrong in principle. On the contrary that case re-establishes once and for all that there is no duty cast on the prosecution to actually prove their case beyond reasonable doubt as to the guilt of the accused at the close of the case for the prosecution. There is accordingly no rejection of the "established beyond reasonable doubt" test provided that it is applied at the stage of the trial in the hypothetical form;

(7) in considering the question of law whether there is some evidence (not inherently incredible) to prove one or more of the essential ingredients of the offence the judge or magistrate must by necessity evaluate and weigh all the evidence. If there is no evidence at all to prove one or more of the essential ingredients of the offence the accused must be acquitted without calling for his defence. The requirement of section 180 or section 173 (f) of the Criminal Procedure Code cannot be properly complied with unless the judge or magistrate considers and evaluates all the evidence adduced by the prosecution as tested in cross-examination;

(8) in the present case the learned trial judge did not